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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

NO. 258

CENTRAL PACIFIC RAILWAY COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation, *Petitioners and Appellants below,*

vs.

COUNTY ALAMEDA, a body politic and corporate, CHAS. W. HEYER, RALPH RICHMOND, JOHN F. MULLINS, REDMOND C. STAATS and WILLIAM J. HAMILTON, Members of the Board of Supervisors of said County, JOHN DOE CORPORATION, RICHARD ROE CORPORATION, JOHN SMITH, THOMAS BROWN, JAMES COE, JOSEPH HOE, EDWARD POE, ROBERT CROW and FREDERICK STOW, *Respondents and Respondents below.*

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPRPEME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

T. P. WITTSCHEN,
Latham Square Building, Oakland, California.
EARL WARREN,
District Attorney of the County of Alameda, State of California.
RALPH E. HOYT,
Chief Assistant District Attorney of the County of Alameda, State of California.
JAMES H. OAKLEY,
Deputy District Attorney of the County of Alameda, State of California.
Attorneys for Respondents.

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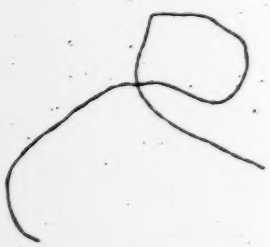

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vs.

COUNTY ALAMEDA, a body politic and corporate, CHAS. W. HEYER, RALPH RICHMOND, JOHN F. MULLINS, REDMOND C. STAATS and WILLIAM J. HAMILTON, Members of the Board of Supervisors of said County, JOHN DOE CORPORATION, RICHARD ROE CORPORATION, JOHN SMITH, THOMAS BROWN, JAMES COE, JOSEPH HOE, EDWARD POE, ROBERT CROW and FREDERICK STOW, *Respondents and Respondents below.*

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPRPEME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

In answer to the Petition for Writ of Certiorari on file herein dated July 10, 1931, respondents County of Alameda, a body politic and corporate, Chas. W. Heyer, Ralph Richmond, John F. Mullins, Redmond C. Staats and William J. Hamilton, Members of the

Board of Supervisors of said County, respectfully show:

1. Deny that as to those three certain parcels of land, designated in the Findings of Fact and Conclusions of Law of the Trial Court in this action as parcels "D", "E", and "F" (R. p. 37, at 47-51), said Trial Court found the Central Pacific Railway Company's title qualified by Section 2 of the Act of Congress, approved March 3, 1875 (18 Stat. 482), being the general act granting railroad rights of way through the public domain; and in this connection allege that the Trial Court found that Central Pacific Railway Company was entitled to possession of said parcels, and each of them, subject to an easement in favor of County of Alameda by reason of necessity to maintain said County's present right of way for highway purposes, subject, however, to the terms and conditions of Section 2 of said Act approved March 3, 1875.

2. Deny that in affirming the judgment of the Trial Court the Supreme Court of the State of California held that this railroad right of way granted by special act of Congress is amenable to the police power of the state for longitudinal highway encroachments; and in this connection allege that said Supreme Court held that since the United States courts had ruled that such rights of way are amenable to the state police power through the exercise of the right of eminent domain,

it would be "wholly illogical to hold . . . that the same character of easements, subject to the same conditions, may not be acquired by the public by adverse user extending over a long period of years, . . ." and that under the facts of this case respondent County had acquired such an easement (R. pp. 196-7, 81 Cal. Dec. 652, 659).

3. Deny that said State Supreme Court held that the special right of way grant of July 1, 1862, was amended by the Act of March 3, 1875, authorizing the joint occupancy of the right of way by the railroad and by the highway; and in this connection allege that said Court held that whatever might be the law as to the effect of said Act of March 3, 1875, respondent County "is nevertheless clearly entitled to a decree under the doctrine of adverse user, . . ." (R. p. 203; 81 Cal. Dec. 652, 664).

4. Deny that the ruling of the State Supreme Court to the effect that the police power extends to the taking of longitudinal strips of railroad right of way specially granted by Congress is inconsistent with numerous or any rulings of the Supreme Court of the United States.

5. Deny that the ruling that longitudinal portions of railroad right of way may be acquired by adverse possession is contrary to the or any decisions of this Court and are contrary to the general rule that the

continuous operation of a railroad on the right of way forestalls adverse rights in the general public.

6. Deny that the ruling of the State Court that the right of way grant of July 1, 1862, was, as to vested title, qualified and diminished by the Act of March 3, 1875, is inconsistent with the ruling of this Court in the cases mentioned or any other cases.

WHEREFORE, respondents pray that said Petition for a Writ of Certiorari be dismissed with costs.

Dated: Oakland, California, September 1, 1931.

T. P. WITTSCHEN,
Latham Square Building, Oakland, California.

EARL WARREN,
District Attorney of the County of Alameda, State of California.

RALPH E. HOYT,
Chief Assistant District Attorney of the County of Alameda, State of California.

JAMES H. OAKLEY,
Deputy District Attorney of the County of Alameda, State of California.

Attorneys for Respondents.

STATE OF CALIFORNIA,
COUNTY OF ALAMEDA. } ss.

WM. J. HAMILTON, being first duly sworn, deposes and says that he is one of the respondents in the above entitled proceeding, and further that he is the Chairman of the Board of Supervisors of the County of Alameda, State of California, which said County is likewise one of the respondents in this proceeding; that as presiding officer of the governing body of said County he makes this verification for said County of Alameda and likewise for the members of said Board; that he has read the foregoing answer to the Petition for Writ of Certiorari, and that the same is true of his own knowledge except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

WM. J. HAMILTON.

Subscribed and sworn to before me this 2nd day of September, 1931.

(SEAL)

Notary Public in and for the County of Alameda, State of California.

BRIEF IN SUPPORT OF ANSWER TO PETITION.

ARGUMENT

Petitioners' statement of the facts of this case embodied in their petition and under the heading "III, Statement of the Case," is substantially correct, though it is believed a better comprehension of the facts and the issues may be gained from the opening paragraphs of the opinion of the Court below (81 Cal. Dec. 652, 653-6, 299 Pac. 75).

Preliminarily, it may be said that respondents take no issue with the assertion that a federal question is involved, for the whole controversy turns upon the construction to be given to certain federal statutes. Nor is it denied that there is a certain novelty in the points at issue. Whether the matter is of such nature as to require the further consideration of this Court will no doubt turn upon this Court's estimate of the State Court's decision. (Rules of Supreme Court, Rule 38, Sec. 5a). The opinion is attacked upon three grounds, which will be taken up in the order presented.

I.

The Act of July 1, 1862, was not an unqualified grant vesting a title incapable of and entirely beyond any sort of modification by Congress.

This is apparent from the statute itself, which,

among other limitations (such as forfeiture for failure to complete a certain amount of construction within a limited time), contained the provision (in Sec. 17, 12 Stat. 489, 497) that "Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend or repeal this act."

The Act of June 24, 1912 (37 Stat. 138) effected a qualification of the 1862 grant, in that it was therein provided that adverse possession might ripen into title as against a railroad claiming under the earlier grant. If Congress could have enacted legislation in 1912 that opened a way whereby individuals might acquire unused portions of rights of way granted in 1862, it certainly could have done so in 1875. The Act of March 3, 1875, (18 Stat. 482) required railroad companies whose lines passed through narrow canyons to permit public highways "necessary for the public accommodation" to occupy their rights of way. Such limitations as these statutes provide are obviously inconsistent with the idea of a vested title utterly beyond encroachment or entirely out of the reach of the granting power.

The Act of 1912 has been construed in the cases cited by Petitioners (*Union Pac. R. R.* vs. *Laramie Stock Yards,* 231 U. S. 190, and *Union Pac. R. R.* vs. *Snow,* 231 U. S. 204). The doctrine of those cases has been explained by the State Court (R. pp. 201-203, 81

Cal. Dec. 662-663), and it is believed no further comment is necessary.

The Act of 1875 seems never to have been considered in the reported cases in connection with a public highway upon a railroad right of way. Petitioners refer to two decisions of this Court concerning rival railroads each desirous of establishing its line through narrow mountain passes. (*Railway Co.* vs. *Alling,* 99 U. S. 463; *U. S.* vs. *D. & R. G. Ry.,* 150 U. S. 1). Their construction of these cases would appear to limit the effect of the Act of 1875 to instances where a company had originally obtained a land grant subject to compliance with certain conditions, then failed to meet the conditions, and while in such position suffered the imposition of the new conditions imposed in the intervening statute of 1875, Congress subsequently waiving the forfeiture and extending the construction time limit. Nothing in the Act, however, justifies a limitation of its application to such facts. The language used is broad and inclusive, and apparently was designed to establish as a general rule "That any railroad company whose right of way . . . passes through any canyon, pass or defile, shall not prevent any other railroad company from the use and occupancy . . . And the location of such right of way through any canyon, pass or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon

road or highway where such road or highway may be necessary for the public accommodation; . . ." (Sec. 2 of 18 Stat. 482).

Petitioners' reference to the Sinking Fund Cases, 99 U. S. 700, is beside the point. The principle quoted from the opinion of Mr. Chief Justice Waite is one that no one is ever likely to question in this Court. The controversy arises only as to its application to particular cases. It would be idle to discuss it in a case where Congress reserved the right to alter, amend or repeal in the grant itself. The manner and scope of limitations which may properly be imposed are illustrated by the two enactments above referred to, and also by the Transportation Act of May 25, 1920 (41 Stat. 621), which permitted land grant railroads to alienate portions of their lands. In reference to the cases mentioned it is interesting to note that Chief Justice Waite's statement of the rule mentioned was only preliminary to holding that a subsequent Act (that of May 7, 1878) was not a repudiation of any contract entered into by the Government by reason of the Act of 1862.

II.

Title of Grantees under the Act of July 1, 1862, are subject to Public Rights Obtained by Adverse User commensurate with the States' Police Power.

This case is not concerned with the lack of authority

of a land grant railroad to divest itself of title to a portion of its right of way by grant, abandonment or dedication; nor are we concerned whether an individual may acquire rights in such property by prescription. It may be conceded that in neither of such instances will the courts permit encroachments as against the railroad. We are here concerned, however, only with the propqsition of whether the public can use so much of the railroad's right of way as may be reasonably necessary under the rather unique facts of the case.

The necessity for the encroachment is summarized in the findings of the trial court in the following language (R. p. 50):

> "That the topographical, geographical and other physical features and conditions existing in the disputed portions of the right of way through Niles Canyon, viz: the narrowness of the canyon, proximity of Alameda Creek which in the winter season becomes a torrential stream sometimes capable of destroying bridges and roadways, and the steep sides of the canyon make it practically necessary to maintain the highway through the disputed territory because of the overwhelming difficulties to substitute a different route in those places where the road is within the 200 foot limit from the center line of main track of railroad."

Southern Pacific Co. v. *Hyatt,* 132 Cal. 240, is mentioned by Petitioners (Brief pp. 23-24) as supporting their view as to inviolability of their right of way.

That case involved only the right of an individual to acquire by adverse user. The dictum concerning the rights of the public, while perhaps correct in the ordinary situation, cannot weigh heavily under the extraordinary facts of the instant case.

Likewise, the Texas case (*Heilbron* vs. *St. L. S. W. Ry. Co.* 52 Tex. Civ. App. 575, 113 S. W. 613, referred to on pp. 25-26 of Petitioners' Brief) did not involve any such necessity as appears in this case. The same is true of *Williams* v. *Atlantic Coast Line R. Co.* 17 Fed. (2nd) 17 (Brief p. 24).

In *Northern Pacific Ry. Co.* v. *Townsend,* 190 U. S. 267, another case cited by Petitioners (Brief pp. 23-24), the distinction between rights of the public and of individuals with relation to Federal right of way grants is recognized. This court there remarked (P. 272):

> "Of course, nothing that has been said in anywise imports that a right of way granted through the public domain within a State is not amenable to the police power of the State. Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of railroad crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use."

Other cases holding that lands acquired from the Government for railroad purposes remain at all times subject to exercise of the state's power of eminent domain are mentioned in the decision under review (R. pp. 195-6, 81 Cal. Dec. 652, 659), and further comment is deemed unnecessary. Suffice it to say that where the necessity is apparent from the circumstances proven, the needs of the public will not be sacrificed in favor of maintaining the rigidity of a trust which could not have been within the contemplation of the granting power.

Strong reliance is placed upon *Holland Co.* v. *Nor. Pac. R. R. Co.* 208 Fed. 598, 214 Fed. 920 (Brief pp. 21-22), wherein, it is claimed, the right of the public to acquire a longitudinal easement for a public highway was denied. Here again, however, there was involved no such necessity as arises in the case at bar. The court was speaking of a public street within a town and over flat lands. After stating (214 Fed. 920, 926) that "public use implies an underlying necessity and the fundamental consideration therefor is that of superior need", and explaining that crossings for public highways must have been within the contemplation of Congress at the time of the grant, so that the grant includes an implied limitation for ways of necessity, the following significant statement occurs (214 Fed. 926):

"We do not say that a case is inconceivable

where for a limited distance, some concession may not properly be made for this or an analogous purpose, but the necessity must be great and the conditions unusual in the extreme to warrant it."

Respondents cannot agree with the assertion (Petitioners' Brief, p. 19) that for authority to take longitudinal strips of right of way by eminent domain the opinion of the State Supreme Court rests entirely upon the case of *North Coast Ry.* v. *Nor. Pac. Ry. Co.* 48 Wash. 529, 94 Pac. 113. The passage just quoted from the *Holland* case, together with the principle announced in the *Townsend* case (*supra,* 190 U. S. 267, 272) support the same conclusion. Nor can we concede that "it is clear that the (Washington) court rested its decision upon the assumption that the right of way did not take effect in Union Gap until the year 1885". The Washington court considered and relied upon many of the cases cited in the opinion of the California court (R. pp. 195-6, 81 Cal. Dec. 658-9) and said (94 Pac. 114):

"It is true the most, if not all, of the last-cited cases related to crossings of other railways . . . whereas the tract here sought . . . is a longitudinal tract about three-fifths of a mile in length, to be carved out of claimant's right of way. The principle as to the power of eminent domain is, however, the same in both cases, depending upon the necessities of the occupying railroad and those of the public service. . . . It is therefore held here that the petitioner may invoke the power of eminent domain to acquire a longitudinal part of claimant's right of way if the showing as to the neces-

sities of the two companies in the interest of the public service is sufficient to warrant it."

Moreover, it was expressly held in that case that the Act of March 3, 1875, had no bearing on the situation. (94 Pac. 115):

"With this view it is unnecessary to examine the question discussed in the briefs as to whether the act of 1875, being subsequent to that granting the right of way, applies here."

III.

The necessity for the Particular Highway is Established, The Highway Has been established since 1859, *and no Estoppel arises to prevent the County from asserting its easement.*

In the closing portion of their brief Petitioners evidently contend that there exists no real necessity for the route of the highway involved, that there never was a public highway there prior to occupancy by the railroad, and that the state, having expressly approved the grant of 1862, should not now be heard to say that it needs the road which has been there since 1859.

In disputing the argument of necessity, they are forced to go back of the findings in the case. It is respectfully submitted that by all known rules of law those findings are not now open to attack if based upon any substantial evidence. The following excerpts from the record sufficiently indicate that the finding of necessity was well founded:

"A. (To question by Mr. St. Sure for the County): Of course, at the present time there are several places where the road is outside of the four hundred foot right of way. In other places, in attempting to construct a road outside of the four hundred foot right of way we probably would run up against a proposition of steep hillsides that would require very expensive cuts, long slopes, and consequently heavy embankments. The road is located in the bottom or at the foot of the slope in an endeavor to reduce the grade as much as possible. If the relocation was placed on the hillside the grade would be materially increased. As to the length of the roadway it would require the road way to go back into the various canyons as you come to them instead of following up the face of the defile itself. Undoubtedly the road would be more dangerous because of the high slopes and the tendency for the rock and other material to fall down the road, and the expense would be very much greater than a road constructed at the foot of the slope. I don't know whether I can add anything to that answer or not; in other words, the relocation of that roadway outside of the four hundred foot strip would entail additional expense and additional grade and length of road and would endanger the people traversing the same by reason of the slopes, the tendency of the slopes to cave and rocks fall down.

Q. Summing up these facts, will you state whether it is your opinion that it is practicable and feasible?

A. A road can be built most anywhere regardless of the expense. It would be most practicable to build a road at the foot of the slope and my answer would be that it would not be practicable if it can be placed at the foot.

Q. You mean it is possible not feasible?
A. Possible but not feasible."
(R. pp. 135 to 137.)

And a little later the same witness testified:

"It would be either on the hillside, on the slope of the hill, or on the top. It would not be feasible for people on the south side to use a road that would be located on the north side and therefore probably would have to have two roads to allow people on both sides to go out." (R. p. 139).

And also:

"If a new road is built through there it may take ten years or more before the slopes become suitable, and consequently you will have slides on account of the slopes and also the rains and other debris dropping down onto the roadway and endangering passing vehicles and people." (R. p. 150).

The railroad's own engineer testified in this regard:

"Q. (By Mr. Thunen): What conclusion did you reach as to the practicability of relocating that highway outside of the railroad right of way lines?

A. My conclusion was it could be located outside of the railroad right of way, but that the present road was the better alignment. It could be put over on the other side of the creek.

Q. Are there any very serious obstacles in the way of construction outside of the railroad right of way?

A. I could see none that were very serious, but it would entail considerable cost, but from an engineering standpoint I believe it could be located

on the south side if necessary." (R. pp. 171-172).

As indicating what degree of necessity is requisite in matters of this kind, reference is again made to the Washington decision (*North Coast Ry.* v. *No. Pac. Ry. Co. supra,*) where it was claimed that a sufficient showing on this point had not been made (94 Pac. 115):

> "It is true it is not shown to be impossible to construct . . . a line . . . on . . . claimant's right of way . . . if a sufficient amount of money is expended and the increased dangers are not considered. It does appear, however, that it is not reasonably practicable to adopt either of the routes proposed by claimant when all the surroundings are considered . . . A reasonable public necessity is all that is required to authorize the condemnation of property already devoted to a public use."

Petitioners argue (Brief pp. 27-28) that in view of the alleged divergence between the line adopted by the Board of Supervisors of Alamda County in 1859 and the route actually travelled, there was actually no public highway through Niles Canyon. Here again they are met by the finding of the trial court. (R. pp. 49-50):

> "That in the year 1859 defendant Alameda County surveyed and laid out through the said Niles Canyon, under Survey No. 247, a county road which was in the same year declared by the Board of Supervisors of said county to be a public highway; . . . that for more than sixty years there has existed with the knowledge of plaintiffs and

> their predecessors a highway for ordinary vehicular travel through Niles Canyon; but the said highway did not exist throughout in its present location hereinabove particularly described prior to March 27, 1911, but that those parts of the old road No. 247 not expressly abandoned by the Board of Supervisors on said date and now included within the limits of County Road No. 4974, are a part of the present traveled road; . . ."

This finding necessarily adopts the hypothesis that the road laid out and traveled was that referred to in the survey adopted by the supervisors. At the trial Petitioners sought to establish that the road traveled did not conform to the survey by testimony of their own engineer that he had attempted to re-run the old line and found it to be placed on the side of the canyon where admittedly no road had existed. However, it is further evident from the testimony that the old survey was made by a method now regarded as inaccurate and long since discarded, and that monuments therein mentioned are now impossible of location. Mr. Posey, Respondents' engineer, stated (R. p. 131) that "it would be very difficult to replace a line . . . on the ground as the road was intended to be in the beginning, being that the bearings are only to the nearest quarter of degree. A surveyor of this day and age would have a very difficult time relocating that roadway."

Furthermore, the testimony of several old settlers indicate that they traveled over the road before the rail-

road was built (which was 1867-8: R. p. 46), and that the existing road corresponds with the one so traveled except for certain changes of alignment made in 1911. (Testimony of Mr. Richard, beginning R. p. 101, and Mr. Buttner, R. p. 114).

Again, there is evidence that the old survey was not remote from the creek. One of the petitions for change in alignment states: "If a road was made upon the present surveyed route it would be destroyed by the first rise of the creek." (R. p. 167).

In reference to the contention (Brief p. 29) that the state memorialized Congress in 1852 for the purpose of granting a right of way through the state for a transcontinental railroad (Calif. Stat. of May 1, 1852) and subsequently ratified the grant (Calif. Stat. of Apr. 4, 1864), it seems obvious that by such action the state did not and could not reasonably be said to have thereby rendered the rights and conveniences of the public which supported the railroad subservient to the latter's claim to a title out of reach even of a superior public use.

Assuming that the Federal Government has an interest to maintain in this case, as is contended (Brief p. 29), it would seem that the railroad company is not the one to assert it. No complaint has been heard from the United States, and it is respectfully submitted that

through its courts the Government has recognized the need for such encroachments as that complained of here.

CONCLUSION:

Under all the circumstances, it is submitted that no substantial ground for further proceedings in this case has been shown, and a writ of certiorari should not issue.

Dated: September 1, 1931.

T. P. WITTSCHEN,
Latham Square Building, Oakland, California.

EARL WARREN,
District Attorney of the County of Alameda, State of California.

RALPH E. HOYT,
Chief Assistant District Attorney of the County of Alameda, State of California.

JAMES H. OAKLEY,
Deputy District Attorney of the County of Alameda, State of California.

Attorneys for Respondents.